No. 14866

In the United States Court of Appeals for the Ninth Circuit

A. M. ANDREWS COMPANY OF OREGON, AND A. M. ANDREWS OF ILLINOIS, INC., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

ON PETITION TO REVIEW AND ON REQUEST FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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INDEX

AUTHORITIES CITED

Cases:

Cases—Continued

Statutes:

Miscellaneous:

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JURISDICTION

This case is before the Court upon the petition of A. M. Andrews Company of Oregon (herein referred to as Andrews of Oregon) and A. M. Andrews of Illinois, Inc. (herein referred to as Andrews of Illinois), to review and set aside an order of the National Labor Relations Board (R. 54-57) issued against petitioners on September 14, 1954, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Sec. 151, *et seq.*). The relevant provisions of the Act are reprinted *infra,* pp. 19-21. The Board in its answer to the petition requested enforce-

ment of its order (R. 110). This Court has jurisdiction of the proceeding under Section 10(e) and (f) of the Act, inasmuch as petitioner Andrews of Oregon transacts business at Portland, Oregon, within this judicial circuit.[1] The Board's decision and order are reported at 112 NLRB 626.

COUNTERSTATEMENT OF THE CASE

I. The Board's Findings of Fact [2]

Briefly, the Board found that Andrews of Illinois and Andrews of Oregon were a single employer within the meaning of the Act; that they locked out the employees of the Illinois plant to discourage membership in the International Association of Machinists, AFL, herein called the Union, in violation of Sections 8(a)(3) and (1) of the Act; and that petitioners were responsible for certain threats, interrogations and promises violative of Section 8(a)(1), directed at petitioners' employees by a local Businessmen's Committee. The subsidiary facts upon which these findings rest may be summarized as follows:

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[1] For the 12-month period beginning July 1, 1953, sales by Andrews of Oregon totaled $943,000. Of this amount, $719,000 represented receipts on shipments to purchasers outside the State of Oregon. During the same period raw materials valued at $359,000 were shipped to the Oregon corporation from points outside the State of Oregon (R. 4). During the 3 months in which Andrews of Illinois was in operation, its sales totaled $26,000, of which $22,000 represented receipts from out-of-State sales, and its interstate purchases exceeded $21,000 *(ibid.)*. Petitioners were thus engaged in interstate commerce, and do not challenge the Board's assertion of jurisdiction over their operations.

[2] The facts here set forth are those found by the Trial Examiner and adopted by the Board (R. 3-15, 47). With one exception noted *infra*, p. 7, n. 4, petitioners have stipulated that these findings are to be accepted on this review (R. 114).

A. *Andrews accepts the offer of the Carterville Businessmen's Committee of a plant and "a plentiful supply of labor" for the manufacture of Andrews' plastic hose lawn sprinklers*

Andrews of Oregon is engaged in the manufacture of plastic hose lawn sprinklers. Its president and general manager is A. M. Andrews whose name it bears and who owns over 95 percent of its stock (R. 3).

In 1954, Godfrey Hughes of Southern Illinois, Inc., whose purpose it was to attract industries to Southern Illinois, interested Andrews in opening a plant in that State to manufacture his sprinkler product. In furtherance of this proposal, Hughes arranged a meeting between Andrews and a Committee of Businessmen from Carterville, Illinois, consisting of Lee Hooker, Mack Steffes, Paul Dorcy, and Wes Hayton, who offered both plant and "a plentiful supply of labor" to induce Andrews to select Carterville as the site for his new factory in Illinois (R. 3-5; 69-70). Andrews traveled from Oregon to Carterville to work out the details of this offer, and, as a result, signed an agreement with the Carterville Committee in which it undertook to erect a plant in Carterville for the use of and eventual acquisition by Andrews (R. 3-5; 69-70).

Thereafter, the businessmen of Carterville supplied the funds and the material for the construction of the plant building and Andrews provided the means to finance the new manufacturing operation.

To carry out his part of the agreement, Andrews organized Andrews of Illinois as an Illinois corporation to operate the plant. His Oregon corporation, supplied not only all of the original capital needed for the new venture (including $5,000 paid in for the capital stock

of Andrews of Illinois, and a loan of $63,210.90 for the purchase of materials and for the payment of operating expenses) but in the short time the Illinois corporation was operating "sank" an additional $3,000 into the business (R. 21; 34-35, 88). Two of the Oregon technicians, Milo Smith and James Patterson, were sent to Illinois to oversee the installation of the machinery, to set up the assembly line, and to train the personnel in the new plant. In charge of Andrews of Illinois as managing agent was John Tuttle, Andrews' nephew and an employee of Andrews of Oregon. Tuttle reported directly to his uncle who as a practical matter controlled both corporations, including their labor relations (R. 52; 66, 86-87, 95-96). Andrews of Oregon also supplied all of the credit for the Illinois corporation. It guaranteed payment of all debts and carried on its own books as an account receivable the inventory of raw materials purchased for the Illinois operation. This was done because the suppliers would not extend credit to the newly formed Illinois corporation (R. 3, 4, 51, 52; 68, 73, 74, 75, 88).

Following the shutdown of the Illinois plant a few months later, discussed *infra,* Andrews of Oregon took possession of all of the machinery, none of which had been paid for, the inventory and the raw materials of the Illinois plant, and paid all of its debts (R. 4, 52; 72-75).

The officers and the shareholders of the two corporations interlocked. Andrews, Norman Brown, and Ray H. Lesher [3] occupied the offices of president, treasurer, and secretary, respectively, of each corporation.

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[3] On July 26, 1954, after the shutdown of the Illinois plant discussed *infra*, Lesher resigned as secretary and Norman Brown, the treasurer, was elected to replace him.

Andrews owns 95 percent of the stock of Andrews of Oregon, while the latter two officers each held a single share in that corporation. These three, together with Andrews' nephew, John Tuttle, owned one share apiece in the Illinois corporation. Tuttle acted as vice president and managing agent of the latter. Tuttle returned to Andrews of Oregon after the dismantling of the Illinois plant, discussed *infra* (R. 3, 4, 50, 52; 66).

B. *Andrews learns that the Illinois employees have joined the Union and the new plant is ordered closed*

Andrews of Illinois began to produce the plastic lawn sprinkler on April 27 with five or six employees (R. 6). On May 11, there was a temporary layoff because of insufficient midwestern orders, and a notice explaining this fact was posted for the employees (R. 6). At about that time, one of the employees asked Foreman Patterson about the advisability of bringing a union into the plant (R. 9). The foreman replied that a "Company union" would probably be all right, but he did not think Mr. Andrews would "stand for a large union to come in" (R. 9).

Operations were resumed on May 26, at which time Vice-President Tuttle informed the 38 employees then hired "that the Company had plenty of materials and orders and . . . there would be plenty of work for the rest of the summer" (R. 6).

Unknown to petitioners, the Union during the period of the layoff had conducted an organizational campaign among the employees (R. 6). On the morning of June 1, Vice-President Tuttle received a letter from the Union claiming to represent the Illinois employees and

requesting a meeting for the negotiation of a collective bargaining agreement (R. 6). Tuttle lost no time in telephoning this information to President Andrews in Portland. Andrews ordered Tuttle to stop production and to close the plant (R. 6). Thereupon, Tuttle posted a notice stating that effective as of the regular quitting time on that day, June 1, the plant would be closed (R. 6). Unlike the previous notice, this one specified no reason for the closing (R. 6-7).

C. *The Businessmen's Committee threatens the employees in an effort to defeat the Union; the plant shutdown becomes permanent*

In addition to calling President Andrews about the Union, Tuttle also telephoned the Businessmen's Committee (R. 7). Shortly after 2 p.m. on June 1, the five members of the Committee appeared at the plant to address the employees on the subject of the Union and its request to bargain (R. 7).

Hughes, the Committee spokesman, stated that the Committee had come to the plant because he had received a phone call from Tuttle about the Union (R. 7). He proceeded to read to the employees the Union's letter to the Company (R. 7). Hughes explained that Andrews "would not tolerate a union in the plant" and that the notice on the bulletin board closing the plant was Andrews' "answer" to the Union's letter (R. 7). Hughes also said that though he could probably get another manufacturer into the building, he could not guarantee that any of the present employees would have jobs there (R. 7). He then inquired whether the employees would reconsider their decision to join the Union and suggested that the employees vote on the question (R. 7-8). After some reluctance on the part of the employees to express their sentiment with a

signed written ballot, a majority voted by a show of hands to continue working without a union (R. 8).

After the meeting Hughes represented to Andrews in a long-distance conversation, that he could straighten out the "union trouble" and asked for authority to direct Tuttle to keep the plant open (R. 8, 10). Andrews refused to countermand his decision to shut down the Carterville operation, saying that he would not have a labor union dictate his plans (R. 10).

The meeting lasted from about 2:10 p.m. to 3:00 p.m., time for which the employees were paid (R. 8). Neither Vice-President Tuttle nor Foreman Patterson were present during the meeting; but Tuttle was in the office nearby and Patterson was somewhere else in the plant (R. 7). At some point during the meeting the employees raised a question about their wage rates and about raises. Hooker, one of the members of the Businessmen's Committee, went into the office to "see Mr. Tuttle and get the straight of it," and came back with the information the employees sought, stating that it "was straight from the office" (R. 8, n. 4).

The plant ceased operation at 4:30 p.m. on June 1, and has not since operated except for 2 or 3 days in June or July, when four or five employees were called in to complete a shortage on a Government order (R. 8-9).

On August 3, the Carterville operation was terminated permanently, the inventory and machinery being shipped to the Portland plant (R. 9; 71-72).[4]

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[4] Petitioners declined to stipulate that August 3 was the date of the final closing of Carterville (see R. 114, and p. 2, n. 2, *supra*). The Trial Examiner's finding to that effect, adopted by the Board (R. 9, 47, 51), is supported by the evidence reprinted at R. 71-72.

II. The Board's Conclusions of Law

Upon the above facts and the entire record the Board determined that Andrews of Oregon and Andrews of Illinois were a single "employer" whose operations affected commerce within the meaning of the Act (R. 50-53).[5] The Board found that the decision to close the Illinois plant unlawfully discouraged union membership in violation of Section 8 (a) (3) and (1) of the Act (R. 15-17, 49). In addition, the Board found that the Carterville Businessmen's Committee in attempting to force petitioners' employees to renounce the Union was acting as petitioners' agent and that as such the Committee's actions were attributable to petitioners (R. 11-15). Accordingly the Board found that petitioners violated Section 8 (a) (1) of the Act by the conduct of the Committee in polling the employees as to their union sympathies, warning them that the plant shutdown was Andrews' answer to the Union's bargaining request, stating that Andrews would not tolerate a union in the plant, and threatening that the plant would be moved back to Oregon (R. 14-15).

III. The Board's Order

The Board's order (R. 54-57) requires petitioners to cease and desist from the unfair labor practices found. Affirmatively, the order requires petitioners to make whole the employees discriminated against for whatever sums each would have earned as wages during such plant operations as would have occurred at Carter-

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[5] In this respect the Board's conclusion of law differed from that of the Trial Examiner who concluded that Andrews of Oregon and Andrews of Illinois were separate employers (R. 17-21). The issue is treated *infra*, pp. 9-16.

ville from June 1 to August 3, but for the discrimination, less their net earnings, if any, from other employment during such period. The order further requires petitioners, in the event the Illinois operations are resumed, to offer reinstatement to the aforementioned employees, to pay their moving expenses if the resumption of Illinois operations occurs away from the immediate vicinity of Carterville, and to post appropriate notices.

ARGUMENT

Petitioners in their brief make no attempt to deny that the unfair labor practices found by the Board were committed at the Carterville plant. Petitioners contend only that the Board erred in holding Andrews of Oregon responsible for the admittedly unlawful conduct. We consider first, therefore, the evidence supporting the Board's finding that Andrews of Illinois and Andrews of Oregon constituted a single employer for purposes of the Act, and turn then to petitioners' request that the case be remanded for additional evidence.

I. Substantial Evidence Supports the Board's Finding That Andrews of Oregon and Andrews of Illinois Are So Closely Integrated That They Constitute a Single Employer of the Employees of the Illinois Plant Within the Meaning of the Act

The courts have repeatedly been confronted by the question whether two or more separate corporations under the common control of a single individual or group, and engaged in a related enterprise, constitute a single employer for purposes of the National Labor Relations Act. Recognizing that on final analysis this is a question of fact which "like other findings of fact, is for the Board to make and for [the Court] to review

from the standpoint of substantial evidence," the courts have held that the question of liability for the commission of unfair labor practices is not to be determined by "the corporate arrangements of the parties among themselves."[6] As the Supreme Court observed in speaking of this Act, "its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications." *N.L.R.B.* v. *Hearst Publications, Inc.,* 322 U.S. 111, 129. Where, notwithstanding the existence of separate corporations, their "affairs are so interrelated and intertwined," they will be considered a single employer so that "effectual protection [may] be afforded to the employees whose reinstatement with back pay has been ordered by the Board." *N.L.R.B.* v. *Federal Engineering Co.,* 153 F. 2d 233, 234 (C.A. 6).

Applying these general principles the Supreme Court and the courts of appeals have repeatedly sustained the Board in disregarding the corporate fiction in fixing liability for unfair labor practices. Thus in *N.L.R.B.* v. *Stowe Spinning Co.,* 336 U.S. 226, 227, the Supreme Court noted that four separate corporations when united by "interlocking directorates and family ties . . . equal one for our purposes." See also *N.L.R.B.* v. *National Shoes, Inc.,* 208 F. 2d 688, 691 (C.A. 2), and cases there cited; *N.L.R.B.* v. *Federal Engineering Co.,* 153 F. 2d 233, 234 (C.A. 6); *N.L.R.B.* v. *Lund,* 103 F. 2d 815, 818 (C.A. 8); *N.L.R.B.* v. *Calcasieu Paper Co.,* 203 F. 2d 12, 13 (C.A. 5). A consideration of the facts here, compared to those in such cases as *National Shoes, supra,* discloses ample evidence to support the finding

[6] *N.L.R.B.* v. *Condenser Corp.,* 128 F. 2d 67, 71-72 (C.A. 3).

of the Board that Andrews of Illinois and Andrews of Oregon may be regarded as a single employer for purposes of the Act.

The facts summarized at pp. 3-7, *supra*, establish that A. M. Andrews was the dominant figure in both the Oregon and Illinois corporations. That he dominated the Oregon corporation appears from the fact that he was both its president and its general manager, and owned over 95 percent of its stock. While Andrews testified that there were no labor relations problems in Oregon, the record leaves no room for doubt that, as he himself testified, he "naturally" "would handle any labor relations problems" which arose there (R. 66). And quite apart from this admission it is a fair inference that where the president, general manager and virtual sole stockholder are one and the same person, that person will control important questions of labor policy.

That Andrews was equally dominant in the Illinois corporation which bore his name is likewise clear from the record. His stock interest here was technically not controlling; he and his nephew Tuttle each held one share, and the remaining two shares were divided between Lesher and Brown, each of whom also owned one share in the Oregon corporation. But it was Andrews who arranged for the establishing of the Illinois plant; it was Andrews to whom Tuttle promptly telephoned on receiving the Union's bargaining request; it was Andrews who ordered the shutdown; it was Andrews whom the Businessmen's Committee described to the employees as hostile to the Union; it was Andrews to whom the Committee telephoned in an attempt to keep the plant open; it was Andrews who adhered to the decision to lock the employees out.

Further analysis of the record discloses, moreover, that Andrews' dominance of the Illinois operation did not result from his stock ownership, for he owned no more stock than Brown or Lesher or Tuttle. We submit that Andrews' dominance of the Illinois operations resulted from his ownership and control of the Oregon corporation, and that the Illinois corporation was in reality merely an eastward extension of the Oregon operations. In other words, the unfair labor practices which Andrews caused the Illinois corporation to commit, he was able to cause because he dominated Andrews of Oregon, and as we show below Andrews of Oregon controlled and dominated Andrews of Illinois.

The president, secretary and treasurer of the Oregon corporation succeeded to the same offices in Illinois. These three men held over 95 percent of the stock in Oregon; they held 75 percent of the stock in Illinois, and Andrews' nephew, who had been an employee of Oregon, held the remaining stock in Illinois. The interest of the Oregon corporation in the Illinois venture is further shown by the fact that two of the Oregon technicians were transferred to the Illinois operation to set up the assembly line and to train the personnel in the new plant. In addition to the foregoing, the Oregon corporation supplied all of the capital for the Illinois venture, consisting in part of $5,000 paid in for the capital stock of Andrews of Illinois, and approximately $63,000 loaned for the purpose of materials and for the payment of expenses. The Oregon corporation supplied the credit for its Illinois counterpart. The Oregon corporation guaranteed payment of all the Illinois debts and carried the inventory of the raw materials purchased for Illinois. When Illinois operations ceased, all of the Illinois machinery, none of which had been

paid for, and all of the Illinois inventory and most materials were transferred to Oregon, which paid all of Illinois' debts.

In short, officers of Oregon were officers of Illinois, employees of Oregon ran Illinois, money of Oregon established Illinois, and the very products made by Illinois were eventually reclaimed, and presumably sold, by Oregon. These facts, we submit, bring this case squarely within the authorities cited *supra,* p. 10, and establish that for purposes of this Act the two corporations may be regarded as a single employer.

The facts here are closely analogous to those in the *National Shoes* case, *supra,* 208 F. 2d at 690-691. In that case the court held that National Shoes, a concern doing business in New York City, and National Syracuse, a separate corporation doing business in up-state New York, several hundred miles away, constituted a single employer so as to be jointly liable for a refusal to bargain with the union representing the Syracuse employees. The following parallel columns demonstrate the striking similarity between the *National Shoes* case and the case at bar:

Factors relied on by court in *National Shoes*	Comparable facts in case at bar
1. "Both corporations have the same president and secretary-treasurer."	1. Both corporations have same president, same secretary, same treasurer.
2. "These two individuals were the organizers and sole stockholders of the National Syracuse Corporation."	2. These three individuals, together with the president's nephew were the organizers and sole stockholders of the Illinois corporation.
3. "The Board of Directors of National Syracuse is composed of the same individuals, who are the officers of National Shoes."	3. The same individuals, primarily the president, made the decision, *in Oregon,* to close the Illinois plant (R. 67).

4. "The labor policy of the National Shoes, Inc. is determined by the officers among whom is witness Mac Siegel who determines the labor policy of the respondent, National Syracuse corporation."	4. The labor policy of the Illinois corporation was determined by President Andrews, who owned over 95 percent of the Oregon stock and who "naturally" considered himself "as the man who would handle any labor relations problems at both establishments" (R. 66).
5. "Some employees of National Syracuse have been hired at New York City."	5. The chief employees at Illinois were hired in Oregon.
6. "Counsel for both corporations conducted the bargaining negotiations here [where the unfair labor practice was committed] some of which were held at New York City."	6. The president of both corporations ordered the unlawful lockout at Illinois, but gave the order from Oregon.
7. "National Syracuse purchases its merchandise from National Shoes, Inc."	7. The Oregon corporation paid for the machinery and raw materials used in Illinois, and eventually reclaimed both the machinery and the finished products.

After reciting the seven factors set forth above, the Second Circuit concluded (208 F. 2d at 691):

> The relationship between the two corporations, as disclosed above, amply supports the conclusion that the two respondents may be considered as a single employer. *N.L.R.B.* v. *Stowe Spinning Co.*, 336 U.S. 226 (see note 2, page 227); . . . [citing other cases].

We submit that the same result follows here. As in *N.L.R.B.* v. *Federal Engineering Co.*, 153 F. 2d 233, 234 (C.A. 6), the affairs of the Oregon corporation "are so interrelated and intertwined with those of the [Illinois corporation] as to make it an essential party to this proceeding if effectual protection is to be afforded to

the employees whose reinstatement with back pay has been ordered by the Board."

The *Mount Hope* and *Bonita* cases relied on by petitioners [7] in no way militate against the result urged here; on the contrary, a careful reading of those decisions supports our view. The basic issue actually decided in *Mount Hope* was whether substantial evidence supported the Board's finding that the employer had moved his plant from Massachusetts to North Carolina for the purpose of avoiding bargaining with a union. In discussing that question the court noted that the Board had found the North Carolina corporation to be the *alter ego* of the Massachusetts corporation. In language pertinent here the court stated (211 F. 2d at 372):

> In support of this proposition the Board points out amongst other things that Robert D. Milliken owns 60% of the Massachusetts corporation and 100% of the North Carolina corporation; that the two companies have the same officers and the same name and that 80% of the machinery worth $100,000 and supplies worth $750,000 were sent from Massachusetts to North Carolina and are carried on the books of the North Carolina corporation on open account as purchases yet unpaid for. *These, of course, are significant circumstances;* but the fact remains that the North Carolina business belongs in its entirety to Robert D. Milliken while Daylor owns 36% of the Massachusetts corporation for which he paid $400,000. According to the uncontradicted testimony he has no financial interest in the North Carolina operation and ex-

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[7] *Mount Hope Finishing Co.* v. *N.L.R.B.*, 211 F. 2d 365 (C.A. 4); *N.L.R.B.* v. *Bonita Fruit Co.*, 158 F. 2d 758 (C.A. 5).

> pects it to fulfill its obligations. Under these circumstances we cannot say that the two corporations are one and the same enterprise. [Emphasis supplied.]

The instant record contains similar and more "significant circumstances" indicating that the two corporations should be treated as a single employer, and lacks the factors relied on by the court in the *Mount Hope* case in reaching the contrary result.

The *Bonita* case bears even less resemblance to the case at bar. There the court noted (158 F. 2d at 758-759) that none of the officers or directors of one corporation (Vahlsing) held similar positions with the other (Bonita), and that none of the Vahlsing officers or stockholders even knew of the unfair labor practices which were committed by a Bonita foreman. The court further observed that the foreman's contract of employment was with "Ewing as President of Bonita, Ewing having no interest or authority in Vahlsing, Inc." The very factors on whose absence the Fifth Circuit relied in *Bonita* are present in this case, and impel the opposite result.

II. The Motion to Adduce Additional Evidence Should Be Denied

Petitioners, although moving to adduce additional evidence under Section 10 (e) of the Act, apparently concede (Brief, p. 23), that they do not meet the requirements of that Section that "there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board." Even aside from this compelling reason, petitioners' motion should be denied because the evidence it seeks to adduce is either not material to the issues on this review or is already before the Court.

The first two grounds on which petitioners seek to adduce additional evidence are "financial evidence as to the economic condition of Andrews Illinois" and whether the Board erred in finding "that the closing date of the Carterville plant was August 3" (Brief, p. 23). Since petitioners have conceded that the Carterville lockout was an unfair labor practice, the evidence they seek to adduce would go only to the question of back pay, i. e., when would the Carterville plant have closed for economic reasons. As both the Board and the Trial Examiner noted (R. 21, 49, n. 2), the question as to what date between June 1, 1954 (the day of the lockout), and August 3, 1954 (the date the machinery was shipped back to Oregon) any particular employee or employees would have been laid off for economic reasons is a matter to be determined in back pay negotiations after entry of the decree in this case. See e. g., *N.L.R.B.* v. *Sterling Furniture Co.,* 227 F. 2d 521, 522 (C.A. 9), and the cases there cited and distinguished which, however, are applicable here; see also *N.L.R.B.* v. *Ronney & Sons,* 206 F. 2d 730, 738 (C.A. 9), certiorari denied, 346 U.S. 937; *N.L.R.B.* v. *Cambria Clay Products Co.,* 215 F. 2d 48, 56 (C.A. 6), and cases there cited.

The third matter on which petitioners seek to reopen the record is to procure "additional evidence [to] show more clearly that Andrews Oregon and Andrews Illinois are separate companies" (Brief, p. 23). But neither in the Brief nor in the Motion (R. 108) do petitioners indicate what evidence they have or intend to develop. The Brief contains a single reference (p. 27) to "the supplying of credit by the Oregon corporation to the Illinois corporation," and the Motion merely asks that "additional evidence be taken . . . on the relationship of Andrews Oregon and Andrews Illinois" (R. 108). We respectfully submit that such a vague

request satisfies neither the "materiality" nor the "reasonable grounds for prior failure" tests, both of which must be met under Section 10 (e). Moreover, an affidavit by Andrews on this subject made after the close of the hearing is already a part of the record and was considered by the Board (R. 33-36, 42-44, 48-49). Under these circumstances petitioners' attempt to retry the case should be denied. *N.L.R.B.* v. *Southport Petroleum Co.*, 315 U.S. 100, 103-105; *Southern Furniture Mfg. Co.* v. *N.L.R.B.*, 194 F. 2d 59, 62-63 (C.A. 5), certiorari denied, 343 U.S. 964; *N.L.R.B.* v. *Mastro Plastics Corp.*, 214 F. 2d 462, 466 (C.A. 2), affirmed February 27, 1956.[8]

CONCLUSION

For the foregoing reasons the motion to adduce additional evidence should be denied and the order of the Board enforced.

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MARCH 1956.

[8] Petitioners appear to have abandoned their earlier suggestion (R. 45, 106) that their decision to appear before the Trial Examiner without counsel is grounds for a new trial. See R. 47-48 and the cases holding that absence of counsel will not justify reopening a record. *Roach* v. *Stastny*, 104 F. 2d 559, 562 (C.A. 7); *Baker* v. *Gaskins*, 128 W. Va. 427, 36 S. E. 2d 893, 896-897; *Spoor* v. *Price*, 223 Iowa 362, 272 N.W. 305; *Workingmen's B. & L. Assn.* v. *Stephens*, 299 Ky. 177, 184 S.W. 2d 575, 578; *Winter* v. *N. Y. Life Ins. Co.*, 23 N.Y.S. 2d 759, 760-761. See also 66 C.J.S., New Trial, Sec. 85 (2).

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, * * *

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the excercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

* * * * *

Sec. 10 (e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its members, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the

Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed . . .

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, . . . by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the finding of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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